93-496

No. 93-

In the Supreme Court of the United States

October Term, 1993

IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF OREGON, by and through its Department of Parks and Recreation,

Respondents.

Petition for a Writ of Certiorari To the Supreme Court Of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

Garry P. McMurry
Counsel of Record
Garry P. McMurry & Associates
Attorney for Petitioners
435 Benj. Franklin Plaza
One S.W. Columbia Street
Portland, Oregon 97258
(503) 228-6515

62 FP

QUESTIONS PRESENTED FOR REVIEW

Petitioners hold title to dry sand beach property bounded by the Pacific Ocean's mean high tide line deranged from a United States patent of 1893. Their predecessors built a seawall in 1917 on the dry sand beach of Oregon and extended it north thereon in 1939, without objection. In 1957, Petitioners obtained title to dry sand north and adjacent to the above-described seawall. Twelve years later, in 1969, the Oregon Supreme Court, in State ex rel Thornton v. Hay,[1] held sui sponte that Oregon's dry sand beach, though owned privately, could not be developed so as to limit the public access to it for recreational purposes, because, under the English common law doctrine of Ancient Custom, the public had acquired a paramount

---

[1]State Ex Rel Thornton, et al. v. Hay, et al., 254 Or. 584, 462 P.2d 671 (1969).

unlimited recreational right to the dry sand. In this historical context, the questions presented are:

1. Does the decision in Thornton v. Hay (finding a public recreational easement upon private beach land based upon the English Doctrine of Ancient Custom), as now interpreted by the Oregon Supreme Court below, constitute an impermissible collateral attack upon Petitioner's title deranged from the United States Patent?

2. Does the case of Thornton v. Hay, supra, by ipse dixit, transform Petitioners' private property right of exclusive use to a public property right of unlimited use?

3. Does Oregon property law, applied retroactively upon all private beach property, barring owners rights of exclusive possession, deprive Petitioners, and others similarly situated, of their property without due process of law or deny them of equal protection of state law?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Oregon Supreme Court.

A joint brief was filed amicus curiae on behalf of 1000 Friends of Oregon, League of Women Voters of Oregon and the Oregon Shores Conservation Coalition in the Oregon Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Treaty and Statutes

State Authorities

Pages

State Authorities
(continued)

Other Authorities

No. 93-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF OREGON, by and through its Department of Parks and Recreation,

Respondents.

On Writ of Certiorari To the
Supreme Court Of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

The Petitioners Irving C. and Jeanette Stevens respectfully pray that a writ of certiorari issue to review the July 1, 1993 judgment and opinion of the Oregon Supreme Court.

OPINIONS BELOW

The opinion and judgment of the Oregon Supreme Court dated July 1, 1993 is reported at 317 Or. 131, 854 P.2d 449 (Or. 1993) and is reprinted in the appendix hereto as Vol. I, App. A, p. 1, infra. The Oregon Court of Appeals' decision is reported at 114 Or. App. 457, 835 P.2d 940 (1992), and is reprinted in the Appendix hereto as Vol I, App. B, p. 19, infra.

The opinion of the Circuit Court of Clatsop County, Judge Edison presiding, of January 8, 1991, was not reported, and is reprinted in Vol. I, App. C, p. 22, infra.

STATEMENT OF JURISDICTION

Petitioners seek review from the opinion and judgment of the Oregon Supreme Court of July 1, 1993. The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> ". . . nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment of the United States Constitution, in pertinent part, states:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The 1859 Act of Congress admitting Oregon to the Union is set forth in Vol. I, Appendix D, p. 26, and the Oregon Legislature Act of 1859 accepting admission to the Union is set forth at Vol I, App. D, p. 31.

The Oregon Beach Act of 1967 as amended in 1969 is set forth in pertinent part at Volume I, App. E, p. 34.

The Oregon Land Conservation and Development Commission's Goal 18 is set forth at Vol. I, App. F, p. 50.

STATEMENT OF THE CASE

Petitioners' Complaint alleging a facial and an "applied" taking of their real property under a statewide land planning regulation (Goal 18 at Vol I, App. F, p. 50) was dismissed with prejudice under Rule 21A(8) of Oregon Rules of Civil Procedure, which Rule precludes the offering of facts

not pleaded.[2] Thus, most facts in the record are historical facts set forth in Petitioners' Briefs before the Oregon Court of Appeals, Vol. II, App G, p. 60, and in

---

[2]ORCP21A(8):

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: * * * (8) failure to state ultimate facts sufficient to constitute a claim * * * If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleadings, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. * * *"

their Petition for Review before the Oregon Supreme Court, Vol. II, App. H., p. 140.

The dismissal was based solely on the trial court's holding that the case of State Ex Rel Thornton, et al. v. Hay, et al., 254 Or. 584, 462 P.2d 671 (1969) (hereafter "Thornton"), denied Petitioners the right to exclude the public from their privately owned beach. Vol. 1, App. C., p. 22.

In 1957 Petitioners purchased a single tax lot at Cannon Beach, Oregon. The property in question lays north of, and adjacent to, a seawall built on dry sands, upon which motels have existed since 1917. A plat of the property in question and the adjacent properties to the south is set out at Vol. II, App. G, p. 132A. The parcel described thereon as "Ecola Inn" has been owned by Petitioners' family since 1937. The Petitioners bought the property in question with the intent to extend the old

seawall northerly to enclose the dry sand portion of the property purchased (Tax Lot 8501). Petitioners leased the subject property to the adjacent motel owner for construction of additional motel units thereon. (Vol. II, App. G, p. 71.)

In 1967 the Oregon Legislature adopted the Oregon Beach Act which limited development of the private property on the beaches of Oregon between the 16 foot elevation and the mean high tide line. ORS 390.640 et seq., Vol I, App. E, p. 37. A 1969 Amendment set the visible line of vegetation at coordinate lines. See Vol. I, App. E, p. 47.

In 1969 the Oregon Supreme Court decided the Thornton case, which held that, at least for sixty years, the public had freely recreated on the wet sand and dry sands of Cannon Beach to such an extent as to satisfy the English doctrine of ancient

custom, thereby creating in the public a right of unlimited access upon and across the dry sand portion of all Oregon's privately owned beaches. Thereafter, Petitioners pursued various means under Oregon's Beach Act (Vol. I, App E., p. 34) to recover exclusive use of the subject property.[3]

---

[3] In 1970, the year after Thornton, the Petitioners first petitioned the State for a permit to extend the seawall to the south to enclose the subject property so that additional motel units could be constructed thereon. The permit was denied. In 1982 Petitioners petitioned the state to move the Beach Bill's zone line to conform to the actual visible line of vegetation, thereby allowing construction of the seawall and motel outside the dry sand area covered by Thornton's holding. Petitioners' request was denied. Again, in 1984, Petitioners sought a zone line adjustment. Again, their request was denied. (Vol. II, App. G, p. 109.) Thus every legal avenue was pursued by Petitioners to make use of their property during the twenty years between Thornton and their second petition to construct the retaining wall in 1989, the denial of which resulted in this case.

In 1985 the Land Conservation and Development Commission amended Goal 18 of its Land Use Goals and Guidelines, which goals are binding upon all state agencies and municipal governments. The amendment prohibited the construction of upland protection unless lots were developed by January 1, 1977 or had utilities available. It further prohibited the construction of residential, commercial or industrial structures on the beach. (See Vol. I, App. F, pp. 52-53.)

In 1989 Petitioners again sought a permit to construct a seawall around the dry sand portion of their property (Tax Lot 8501) from the City of Cannon Beach, the State of Oregon's Department of Parks and Recreation and the State's Division of State Lands under the Oregon Beach Act. Each agency denied the permit based, in part, upon the Land Conservation Commission's

Goal 18 prohibition against construction of shorefront protection or industrial, residential or commercial structures on the beach property. Petitioners' present suit followed.

Petitioners filed suit in the Circuit Court of Clatsop County alleging that the State and the City of Cannon Beach's denials constituted both a facial and "as applied" takings of Petitioners' property without just compensation under the Fifth and Fourteenth Amendments of the United States Constitution. The Respondents moved to dismiss both facial and applied takings claims, on the ground that the Complaint failed to state a cause of action, because Thornton held, since 1969, that Petitioners had no protected property right to exclusive use of the dry sand beach and, therefore, could not complain of Goal 18's bar of any development which limited the public's

recreational easement. The trial court agreed and dismissed the Complaint. (Vol. I, App. C, p. 22) Upon appeal, the Oregon Court of Appeals, relying on Thornton affirmed the trial court. 114 Or. App. 457 835 P.2d 940 (1992). (Vol. I, App. B, p. 19) The Supreme Court granted review (315 Or. 271) and affirmed the Court of Appeals and trial court's judgments. 317 Or. 131, 854 P.2d 449 (1993) (Vol. I, App. A, p. 1)

♦

REASONS FOR GRANTING THE WRIT

THE OREGON SUPREME COURT, IN AFFIRMING THORNTON V. HAY, FAILED TO FOLLOW FEDERAL LAW BARRING COLLATERAL ATTACK UPON CLEAR TITLE ISSUED BY A 1893 PATENT AND FAILED TO FOLLOW THE RECENT "TAKINGS," "DUE PROCESS," AND "EQUAL PROTECTION OF LAW" JURISPRUDENCE OF THIS COURT.

In 1969 the Oregon Supreme Court in Thornton held, sui sponte, that the public's

recreational use of Oregon's dry sand beaches (land between mean high tide line and the visible line of upland vegetation) was of sufficient quality and duration (at least sixty years) that, under the English doctrine of ancient custom, the public held a paramount recreational easement to such land, barring any development by the private owner of the dry sand which limited, to any extent, the public's unrestricted recreational easement.

The instant case, for the first time, presented to the Oregon high court three direct challenges to the present day validity of Thornton, i.e.:

A. Thornton's application of the doctrine of ancient custom necessarily constitutes a prohibited collateral attack upon the patent title conveyed in 1893 contrary to applicable federal law barring such attacks.

B. The Thornton case, by ipse dixit, transformed Petitioners' fundamental right of exclusive use of their property into a public right of permanent physical occupation thereof.

C. Oregon property law, applied retroactively upon all private beach property, barring owners rights of exclusive possession, deprives Petitioners, and others similarly situated, of their property without due process of law and denies them of the equal protection of state law.

The importance of this case is that Oregon's high court, in affirming Thornton against each of the above challenges, places Oregon in direct conflict with this Court's prior holdings. The decision in this case also sets Oregon apart from 16 of the 19 littoral states' laws of beach front

property rights.[4]

A. THE THORNTON DECISION, CREATING A PUBLIC RECREATIONAL EASEMENT IN DRY SANDS, BASED ON THE DOCTRINE OF ANCIENT CUSTOM IS, NECESSARILY, A COLLATERAL ATTACK UPON THE ORIGINAL 1893 PATENT GRANTED PETITIONERS' PREDECESSOR IN TITLE.

This federal question was first raised and argued in Petitioners' opening brief before the Oregon Court of Appeals at Vol. II, App. G, pp. 23-25. It was also argued in the Oregon Supreme Court during closing

---

[4]**Hawaii** has adopted its ancient custom of marking its upland boundary at the vegetation line. County of Hawaii v. Sotomura, 55 Haw 176, 182, 517 P.2d 57, 61 (1973) cert. den. 419 U.S. 872 (1974). **Florida**. See City of Daytona Beach v. Tona-Rama, 294 So.2d 73 (Fla 1974). **Texas** adopted prescription, dedication and custom not clearly differentiating which theory specifically applies in any given case. See Arrington v. Mattox, 767 SW.2d 957, 959 (Tex App 1989), and Matcha v. Mattox, 711 SW.2d 95 (Tex App 1986).

argument set forth at Vol. II, App. I, pp. 192-197.

> **". . . To make a particular custom good, the following are necessary requisites.**
>
> **I. That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, it is no good custom . . . . "**
> Blackstone: Commentaries on Laws of England (1765-69), Vol 1, p. 76 (1979). University Chicago Press.

Petitioners' predecessor in title took the land in question along with other land (pursuant to the Homestead Act of May 20, 1862 (Chap. 75)), based on his 1886 affidavit of occupancy and homestead improvement. The patent was issued in 1893.

In 1859, Oregon was admitted to statehood by the Oregon Admission Act (11 Statute at Large 383, February 14, 1859) subject to the condition:

> "* * * That the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; * * *" See Vol. I, App. D, p. 29.

The Oregon Legislature in its first extra session of 1859 accepted the condition verbatim. (Vol. I, App. D, p. 32.)

Prior to the Oregon Donation Act of September 27, 1850 (Chap. 76) there was no land tenure system in the Oregon territory and no statute under which anyone could acquire legal title from the United States. See: Shivley v. Bowlby, 152 U.S. 1 at pp. 50-51, 14 S.Ct. 548 at p. 567, 38 L.Ed. 331 at pp. 349-350 (1894).

In the present case, Respondents argued that Thornton merely enunciated a recreational servitude based upon ancient

custom, which had always been part of Oregon's common law even prior to statehood. In response, Petitioners pointed out that the issuance of the letters patent (1893 in this case) barred all prior inchoate unrecorded claims except those prior rights adjudicated in the patent proceedings and noted in the patent issued. Barker v. Harvey, 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963 (1901); United States v. Title Insurance and Trust Co., 265 U.S. 742, 44 S.Ct. 621, 68 L.Ed.2d 1110 (1924); and Kerns v. Leigh, 142 F. 985 (DC Or. 1906). Petitioners placed special reliance upon Summa Corporation Ltd. v. California ex rel State Lands Commission, 466 U.S. 198, 104 S.Ct. 1751, 80 L.Ed.2d 237 (1984), as clearly barring a state's claim to an inchoate interest in private property for recreational uses not presented in the patent proceedings. The Court below ignored

the Summa holding. It merely reiterated Thornton's language of varying lengths of public beach use, i.e.:

> "Since the beginning of the State's political history;"
>
> "From the time of the earliest settlement to the present day" (254 Or at p. 588);
>
> "The public use of the disputed land in the case at bar is admitted to be continuous for more than sixty years." (Id at p. 593); and
>
> "This land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited." (Id at p. 595.)

By so doing, it failed to distinguish its holding from this Court's rule in Summa Corp v. California, supra, in which this Court held that property held in public trust by the State of California for its citizen's recreational pleasure under that state's common law, could not survive prior

patent procedures vesting clear title to the land in a private citizen. After describing the total control over tide lands claimed by California under its asserted public trust easement this Court stated:

> "The question we face is whether a property interest so substantially in derogation of the fee interest patented to petitioners' predecessors can survive the patent proceedings conducted pursuant to the statute implementing the treaty of Guadalupe Hidalgo. We think it cannot." 467 U.S. at p. 205, 104 S.Ct. at p. 1755, 80 L.Ed.2d at 243.

The same rule applies to patents of the dry sand and uplands conveyed to the patentee, as distinguished from tidelands. See Barker v. Harvey, supra, and United States v. Title and Trust Co., supra.

Thus, the conveyance in 1893 conveyed the U.S. government's title to the mean high tide line unto Petitioners' initial predecessor in interest. Borax Limited v.

Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935). Thus, this case makes the Oregon common law stand in stark contrast to the controlling federal law of title and property rights to littoral land enunciated by this Court in a line of cases stretching from Barker v. Harvey, supra, and United States v. Coronado Beach Co., 225 U.S. 472, 41 S.Ct. 378, 65 L.Ed 736 (1921) and Hughes v. State of Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967), to Summa Corporation v. California, supra, decided in 1984.

This results in the anomalous condition that Oregon, by its incantation of the language of Thornton, may avoid the federal common law of littoral property whereas her sister states of California and Washington have been required to adhere to that uniform federal law through the decisions in Hughes, supra, and Summa, supra.

B. THE THORNTON CASE, AS NOW INTERPRETED BY THE OREGON SUPREME COURT, IN THIS CASE, TRANSFORMS, BY IPSE DIXIT, PETITIONERS' FUNDAMENTAL PROPERTY RIGHT OF EXCLUSIVE POSSESSION OF THE DRY SAND INTO A PERMANENT PHYSICAL OCCUPATION BY THE PUBLIC FOR THEIR UNLIMITED RECREATIONAL PLEASURE.

This federal takings question was raised in Petitioners' brief opposing dismissal of Petitioners' Complaint. It was also raised in Petitioners' opening appellants' brief (Vol. II, App. G, pp. 28-39) and in Petitioners' Petition for Review at Appendix (Vol. II, App. H, pp. 147-154). The argument against retroactive application of Thornton was raised following the decision in Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), by Petitioners' Memorandum of Additional Authorities filed after oral argument with the Oregon Court of

Appeals on July 1, 1992 and again in Petitioners' Petition for Review at Vol. II, App. H, pp. 154-168.

Thornton's use of the doctrine of ancient custom came about by the Oregon Supreme Court's own volition. The case was tried and decided upon the fictional legal theory of implied dedication. But the high court found a better ground, i.e., ancient custom, in order to avoid tract by tract litigation and to apply a uniform rule upon all beaches similar to Cannon Beach in Oregon. 254 Or. at 595. Thus, no briefing on the propriety of the doctrine's application was before the Thornton court or before any other appellate court until this case.

This fact is significant in light of this Court's holding in Lucas v. South Carolina Coastal Council, supra, that decrees or legislation that mandate a

permanent physical occupation or denies all economic use of property "* * * must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already in place upon land ownership." 505 U.S. ____, 112 S.Ct. at 2900, 120 L.Ed.2d at 821. And: "* * * A 'State by ipse dixit may not transform private property into public property without compensation * * *.' Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980)." 505 U.S. at p. _____, 112 S.Ct. at p. 2901, 120 L.Ed.2d at p. 823.

1. Thornton, as interpreted by the court below, strips Petitioners and others similarly situated of their property without just compensation.

The historical facts affecting the land in question and Oregon's legal history make application of the ancient custom doctrine's

element of antiquity extremely problematic. The doctrine could not apply to the land prior to the governmental patent issuance in 1893 and by 1917 the Petitioner's predecessors had constructed a seawall on the dry sand south of the property in question and in 1939 extended it, encompassing dry sand adjacent to the property in question -- all without challenge by the state or any private person (Vol. II, App. G, pp. 105-106, 109-10). Had there been in 1917 or 1939 a "background principle" of recreational servitude based upon ancient custom, that principal would surely have galvanized the state into filing an injunction suit against the initial seawall construction in 1917 or its

extension in 1939.[5]

Other historical facts make the application of custom as enunciated in Thornton, even more problematic. Following the passage of the Beach Act in 1967, the state permitted motel construction on the dry sands of Oregon at the Inn at Spanish Head and Driftwood Shores. (Vol. II, App. G, p. 89.) In addition, in 1992, a restaurant was built upon the dry sands of Lincoln Beach without state interference. When told of these facts and shown pictures of two of the improvements on dry sand, the high court rejected the references to actual dry sand development as not being in the

---

[5]In fact, prior to 1967 (the date of the enactment of the Oregon Beach Bill (Vol. I, App. E, p. 34), no Oregon statute or decree had ever claimed any title or right of any kind to any portion of the beaches except the wet sand, i.e., the land between low, low tide and mean high tide. And, by 1947, 47% of the tide lands or wet sands had been conveyed by the state to private owners. (Vol. II, App. G. pp. 99-100.)

complaint. (Vol. II, App. I, pp. 185-190, transcript of oral argument before the Oregon Supreme Court.)[6]

The court below did not avail itself of the "legislative facts" that post-Beach Act development has occurred on Oregon's dry sand beaches[7] and did not advert to those

---

[6]The Court obviously forgot that the Rule 21(A)(8) Motion to Dismiss a Complaint for failing to state a cause of action, prohibits evidentiary affidavits and exhibits in support of a complaint under Oregon's Rules of Civil Procedure, supra, p. 4 ftn. 2. Thus, the briefs before the trial court, Court of Appeals, and Oregon Supreme Court, of necessity, had to rely upon "legislative" facts being incorporated into the "Brandies briefs" before the courts.

[7]Appellate courts properly take judicial notice of legislative facts of common knowledge, and of facts not necessarily of common knowledge but verifiable, to the same extent as trial courts in arriving at informed policy judgments. Jay Burns Bakery Co. v. Bryan, 264 U.S. 504, 517, 44 S.Ct. 412, 420, 68 L.Ed. 813, 835 (1924); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35, L.Ed.2d 147 (1973). See also K Davis Administrative Law Treatise 2nd Ed § 15.5 (1980); Kirkpatrick: Oregon Evidence, 2nd Ed. § 201(a) (1989).

facts in its opinion, except to note at footnote 8 that the facts were not adjudicated facts. Vol. I, App. A, p. 5.

A further difficulty of Thornton's imposition of the doctrine of ancient custom, giving the public an unlimited right of recreational use on dry sand beaches, is the Oregon Beach Act itself. The Beach Act's constitutionality was based upon the public's ancient use of the beach, but the Beach Act itself restricts that unlimited right of user by providing explicitly that development can occur on the dry sand, subject to state regulation. See Beach Act, § 390.640 et. seq., Vol. I, App. E, pp. 37-41. Further support that the Oregon Legislature in 1969 intended that authorized development should occur on the dry sand is

ORS 307.450[8] which provides that, as of 1970, dry sand would not be taxed, only improvements constructed thereon. Thornton's bar of all development, as interpreted by the Oregon Supreme Court, impliedly repeals the Beach Act's development component: ORS 390.640 et seq. It further nullifies the prospective tax on later improvements, as those improvements are now barred, ostensibly since 1969.

---

[8]ORS 307.450:

" **Certain beach lands.** After December 31, 1969, the land, but not the improvements to the land within the area described by ORS 390.770, is exempt from taxation."

Finally, three years after Thornton, the Oregon Legislature passed ORS 105.677[9]

---

[9]ORS 105.677 states:

"Permissive recreational use of land does not create an easement; preservation of preexisting public rights.

"(1) An owner of land who either directly or indirectly invites or permits any person to use the land for any recreational purpose without charge shall not thereby give to such person or to other persons any right to continued use of the land for any recreational purpose without the consent of the owner.

"(2) The fact that an owner of land allows the public to recreationally use the land without posting or fencing or otherwise restricting use of the land shall not raise a presumption that the landowner intended to dedicate or otherwise give over to said public the right to continued use of said land.

"(3) Nothing in this section shall be construed to diminish or divert any public right acquired by dedication, prescription, grant, custom or otherwise existing before October 5, 1973."

to restrict Thornton's easement by custom to the dry sand beaches of Oregon, thereby clearly indicating a public policy that "easements by custom" would never be used to transform other private lands into public playgrounds, but codifying the recreational servitude upon Oregon's privately owned beaches.

These legislative facts and legal arguments were ignored in the Court of Appeals and Oregon Supreme Court's opinions.

2. The sole purpose of applying, by ipse dixit, a recreational easement based upon ancient custom to Oregon's beaches is to avoid tract-by-tract litigation.

Aside from the questionable propriety of applying the doctrine of ancient custom to the facts of Thornton or other similarly situated property, the critical issue is the avowed purpose of its application. That purpose was to bind all private beach

property so as to avoid property owners ever contesting the application of the doctrine to their private property in tract-by-tract litigation. Thornton, Id at p. 495. That blanket coverage of all privately owned dry sand beaches with an unlimited recreational servitude cannot withstand constitutional scrutiny under the jurisprudence of "takings," nor "procedural due process," nor "equal protection of the law" in the face of Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and especially Lucas v. South Carolina Coastal Commission, supra.

In Kaiser Aetna v. United States, supra, this Court held:

> "In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, [footnote omitted] falls within this category of interests that the Government cannot take without compensation." 444 U.S. at 179-180, 100 S.Ct. at 393, 62 L.Ed2d at 346.

In Loretto v. Teleprompter Manhattan CATV Corp., supra, this Court held that where governmental action results in a permanent physical occupation of the property by the government or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. at pp. 434-435, 102 S.Ct. at 3175, 73 L.Ed.2d 882.

In Nollan v. California Coastal Comm'n, supra, this Court held that a "permanent, physical occupancy" has occurred where individuals are given a permanent and

continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises. 43 U.S. at 831-832, 107 S.Ct. at p. 3145, 97 L.Ed.2d at 685-686.

Thus, there can be no question that a fundamental property right is extinguished by Thornton as to all privately held dry sand beaches in Oregon without any prior precedent in the state backgrounding a principle of "easement by custom." In response to the argument the court stated:

> "Thornton merely enunciated one of Oregon's 'background principles of * * * the law of property.' Lucas, supra, 120 L.Ed.2d at 821." 317 Or. at p. 143.

In support thereof, the court cited Hay v. Bruno, 344 F. Supp. 286 (D. Or. 1972). In Hay v. Bruno, supra, plaintiff Hay argued that Thornton's legal reasoning was

erroneous and not reasonably predictable and should be overturned based upon Justice Stewart's language in his concurring opinion in Hughes v. State of Washington, supra,[10]. Hay v. Bruno did not state that the Thornton decision, adopting easement by custom, enunciated a background principle of real estate law. It merely stated:

> "There was no unpredictable result here. The action of the Supreme Court of Oregon was consistent

---

[10]"To the extent that the decision of the Supreme Court of Washington on that issue [rights to accretion] arguably conforms to reasonable expectations, we must, of course accept it as conclusive. But to the extent that it constitutes a sudden change in the state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court." 389 U.S. at pp. 296-297, 88 S.Ct. at p. 442.

> with and is supported by a number of decisions from other jurisdictions which confirm the right of a state under similar circumstances to protect and preserve it beaches for the benefit of the people. See, Marks v. Whitney, 6 Cal.3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971)." 344 F.Supp. at p. 289. (Emphasis added)

Marks v. Whitney was a California case upholding the State's interest in tidelands, not dry sand, based upon the doctrine of public trust.

The State Supreme Court below has now extended the full effect of Thornton to a petitioner challenging such extension as a taking. Petitioners rely on the holding in Lucas, supra, that the right to exclude must have been founded in Oregon's law of real property prior to 1957, when Petitioners acquired the property in question. In 1957, and prior thereto, there was no judicial or legislative basis for one to contend that

the state or a private person could enjoin the improvement of the property. Therefore, Thornton's latter transformation of the owner's fundamental right to the exclusive use of property into a permanent public physical occupancy, based on the theory of easement by custom, directly violates the holding in Lucas.

3. The public's recreational use of private property prior to an owners' attempted exclusive use does not satisfy the Lucas requirement that the State's law of property must protect the public use prior to a prohibition of an owners exclusive occupancy thereof.

In response to Petitioners' briefs and oral arguments that Oregon's law did not recognize a public recreational easement based upon custom, the Oregon Court of Appeals and Oregon Supreme Court reiterated the Thornton language that the public had used the land for recreation for various

times long enough to satisfy the doctrine of custom.

The longevity of the public's use of the beach is not the issue! The issue is the existence of Oregon's prior rule of real property law that public use of private land creates a recreational easement by custom retroactively binding upon all owners of such affected property. No one can honestly argue that such a rule backgrounded principals of Oregon's common law of real property prior to 1969 and Thornton. In fact, Oregon's common law precludes easements by prescription if user was permissive or by acquiescence. Lethin v. United States, 583 F. Supp. 863 (D.C. Or. 1984); Anderson v. McCormick, 18 Or. 301, 22 P. 1002 (1889).

The dismissal of plaintiff's Complaint for failing to state a cause of action on the ground that the right to exclude was

extinguished by ipse dixit in Thornton, decided twelve years after Petitioners acquired clear title, is in stark contradiction of this Court's rule laid down in Lucas.

C. OREGON LAW OF PROPERTY APPLIED TO PETITIONERS AND OTHERS SIMILARLY SITUATED DENIES THEM OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW.

1. Dismissal of Petitioners' Complaint deprived them of procedural due process.

The procedural due process question was first raised in Petitioners' first brief to the Oregon Court of Appeals: Vol. II, App. G, pp. 90-93, and in Petitioners' Petition for Review at Vol. II, App. H, pp. 154-165, and again in oral argument before the Supreme Court at Vol. II, App. I, p. 210.

The equal protection of state law issue was raised in Petitioners' Petition for Review (App. H, pp. 173-174).

Thornton has been criticized if read to apply to all dry sand beaches as the Oregon Supreme Court has now done. One commentator observed: "The argument can be made that the holding violates proper procedure since other property owners were not before the court to litigate their rights. [Citing Schwartz, The Rights of Property, § 268-69.]" Delo, The English Doctrine of Custom in Oregon Property Law: State ex rel Thornton v. Hay, 4 Environmental Law Rev. 383 at 408 (1974). In Public Access to Beaches, 22 Stanford Law Rev. 565 (1970) the author stated:

> "If read broadly, the [Thornton] decision may be an unconstitutional deprivation of the property rights of littoral owners. To declare ex parte a new public right absent any evidence to support it and without giving the owners with whose property interest that public right conflicts a chance to be heard is to violate fundamental due process principles." Id. at 585.

The avowed purpose of the Thornton court's substitution of a recreational easement based upon ancient custom was to avoid tract-by-tract litigation by owners. While Oregon's Constitution does not have a due process clause, State v. Hart, 299 Or. 128, 140, 699 P.2d 1113 (1985); Linde, Without Due Process, 49 Oregon Law Review 125, 136-37 (1970), the Petitioners, and similarly situated owners of dry sand, are entitled to procedural due process under the Fifth and Fourteenth Amendments to the Constitution. When a fundamental property

right, i.e., the right to exclude the public is extinguished, the affected owners must be given some opportunity to be heard. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed 865 (1950) and United States v. State of Oregon, 295 U.S. 1, 12, 55 S.Ct. 610, 79 L.Ed 1267, 1273 (1934).

Justice Denecke, in his concurring opinion in Thornton, was obviously aware of the due process difficulty when he suggested an evidentiary formula that included "(1) long usage by the public of the dry sands area, not necessarily on all the Oregon beaches, but wherever the public uses the beach; . . ." and "(3) long and universal acquiesce by the upland owners in such public use; . . ." 254 Or. at p. 600. His suggestion regarding adjudication of the elements before the recreational easement is imposed upon other owners fell on deaf ears.

Some commentators have speculated that the Oregon Supreme Court may have heeded Justice Denecke's due process concern in the latter case of McDonald v. Halvorson, 308 Or. 340, 780 P.2d 714 (1989), at least as to the requirement that a citizen or state contending continuous public use must prove it.[11] The McDonald court stated:

> "[Thornton] * * * applied to [fine sand, coarse pebbles, or solid rock] * * * if they abut the ocean and if their public use has been consistent with the doctrine of custom as explained in [Thornton]; otherwise, other rules of law will apply." Id. at pp. 359-60.

However, in this case, in 1993, the Oregon Supreme Court, again quoting snippets of phrases from Thornton, held:

---

[11]Pitts, The Public Trust, 22 Environmental Law Review 731, 736-39 (1992); Clayton, Note, Oregon's New Doctrine of Custom: McDonald v. Halvorson, 26 Willamette Law Review 787, 802-08 (1990) and Long, Note, [McDonald v. Halvorson] Oregon's Beach Bill Revisited, 20 Environmental Law Review 1001 (1990).

> "When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the 'bundle of rights' that they acquired, because public use of dry sand areas 'is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed.' Thornton, supra, 254 Or. at 598. See also State Highway v. Fultz, supra, 261 Or. at 289 (public use has existed since 1889). We, therefore, hold that the doctrine of custom as applied to public use of Oregon's dry sand areas is one of 'the restrictions that background principles of the State's law of property * * * all ready place [sic] upon land ownership. Lucas, supra, 120 L.Ed.2d at p. 821." 317 Or. 131 at p. 143. Vol. I, App. A, p. 12. (Emphasis added.)

Thus, the Thornton "presumption" of "easement by custom" overcomes Petitioners' historical and legal analysis showing the impropriety of applying custom to the land in question presented to the trial court, the Court of Appeals and the Oregon Supreme Court. (See pages 21-30, supra.)

Petitioners and other dry sand owners have no right to protect their fundamental property interest of exclusive possession in Oregon, whereas, James Nollan, in Nollan v. California Coastal Commission, supra, is vindicated in his property right in California and Stella Hughes, of Washington is vindicated in her property rights in Hughes v. State of Washington, supra. Petitioners cannot even obtain a trial. Petitioners' due process rights have effectively been denied.

2. The imposition of the public recreational easement and its inconsistent enforcement deprives Petitioners of equal protection of state law.

As stated earlier (infra pp. 25-27), Petitioners submitted "legislative facts" to the trial court, the Court of Appeals, and the Oregon Supreme Court, that the State has

allowed buildings on the dry sand beaches of Oregon after 1967 (date of the Beach Act), despite the attorney general's argument that Thornton precluded all such development. The three instances of construction on the dry sand, one as recent as 1992, demonstrates one of two conditions in the state of Oregon: (a) Thornton v. Hay does not bar such construction; or (b) Thornton bars such construction, but state and local agencies can inconsistently choose to obey Thornton's proscription or, in their unbridled discretion, ignore Thornton and allow construction on the dry sands of Oregon. The latter condition prevails in Oregon and the state fails to apply the law equally to owners of dry sand, in violation of the Petitioners' right to equal application and enforcement of the law. See Schwartz v. Hudacs, 566 NYS.2d 435, 149 Misc.2d 1024 (1990).

A separate denial of uniform application of Oregon's property law arises by the unconstitutional restriction of the application of the public recreational easement by custom to Oregon's dry sand beaches, but excluding the application of the doctrine from all other riparian land. Thornton limited itself to a sua sponte application of the recreational easement by custom to Oregon's dry sand beaches.

In 1973, four years after Thornton, the Oregon legislature passed ORS 105.677 (supra p. 28, fn. 9) which statutorily confirmed Thornton's creation of the recreational easement by custom on Oregon's beaches, but also strictly limited the doctrine to those beaches and excluded its application to all other private land. Clearly, Indians, settlers, and the state's citizens have traveled along, fished from, and recreated upon trails on the banks of Oregon's myriad

rivers and streams, yet private riparian owners are not subject to a similar commercial-recreational servitude by custom upon their stream bank property. Only dry sand beach owners suffer such a fundamental denial of their property rights. ORS 105.677 singles out Petitioners, and similarly situated beach front owners, from all other riparian owners in Oregon to unfairly bear a unique burden denying them exclusive use of their property where equally strong evidence of long term recreational use and, even stronger evidence of commercial use, of trails along rivers and streams exist, but owners of the property fronting on the high water mark of the rivers and streams are free from the burden. The distinction is irrational and also deprives Petitioners of equal

protection of the law. The City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

CONCLUSION

However great the public benefit is of Thornton's rule of recreational easement on Oregon's beaches by ancient custom, that rule transformed the Petitioners' prior fundamental right of exclusive use into a permanent physical occupation of Petitioners' dry sand by ipsi dixit contrary to Nollan and Lucas. The court below did not objectively and reasonably apply relevant precedents of Oregon law existing prior to Thornton in its analysis of that decision's present day validity.

The Thornton decision is contradicted by the Federal Common Law enunciated by this court in Hughes v. State of Washington, supra and Summa v. California, supra.

Thornton and ORS 105.677's retroactive application denies Petitioners, and similarly situated owners of beach land in Oregon, due process and equal protection of state law guaranteed by the Fifth and Fourteen Amendments.

Respectfully submitted this _____ day of September, 1993.

GARRY P. McMURRY & ASSOCIATES

By:_____

Garry P. McMurry, OSB #58062
Attorney of Record for Petitioners
435 Benj. Franklin Plaza
One S.W. Columbia Street
Portland, Oregon 97258

Counsel for Petitioners